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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 60

CHICAGO AND NORTH ~~GRAND TRUNK~~ WESTERN RAILWAY COMPANY,

Petitioner.

vs.

EUGENE BOLLE,

Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

JOSEPH D. RYAN,

Attorney for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 917.

GRAND TRUNK WESTERN RAILWAY COMPANY,

Petitioner,

vs.

EUGENE BOLLE,

Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

STATEMENT.

For convenience we shall refer hereinafter to the petitioner as defendant and to the respondent as plaintiff.

It is not believed that defendant's petition contains an unbiased and complete statement of the facts and we, therefore, deem it necessary to present a brief resumé of the material facts in evidence.

History of the Case.

Accident occurred December 4, 1922.

First trial took place December, 1923 (Circuit Court, Lake County, Hon. Claire Edwards, trial judge)

Resulted in verdict and judgment for plaintiff in the sum of $20,000.

October 4, 1924, Appellate Court, Second District, opinion filed reversing and remanding cause on the sole ground that plaintiff was not engaged in interstate commerce.

March 4, 1925, on motion of plaintiff, supported by affidavit that no further evidence could be produced on the question of interstate commerce, the court struck out the remanding portion of its order (235 Ill. App. 380).

April term, 1925, petition for certiorari allowed in Supreme Court of Illinois.

February 16, 1927, opinion of Illinois Supreme Court reversing Appellate Court with direction to either affirm the judgment or reverse and remand the cause (324 Ill. 479).

June 27, 1927, Appellate Court filed modified opinion remanding cause for a new trial (246 Ill. App. 31).

February, 1928, cause retried before Hon. Edward Shurtleff, and at conclusion of all the evidence, the trial court directed a verdict for the defendant on sole ground that plaintiff was not engaged in interstate commerce.

January 31, 1929, Appellate Court opinion filed reversing and remanding cause for a new trial (251 Ill. App. 623).

April, 1929, case retried (third time) before Hon. Claire Edwards, resulting in a verdict and judgment for the plaintiff in the sum of $37,500.

September 23, 1930, opinion of Appellate Court, Second District, filed affirming judgment (258 Ill. App. 545).

February 17, 1931, certiorari denied by Supreme Court of Illinois.

The Facts.

The plaintiff, just 22 years of age, entered the employment of the defendant in its roundhouse in Waukegan, on November 15, 1922. He was born and raised on a farm and had had no previous railroad experience of any kind. He was injured December 4, 1922.

When he first went to work in the roundhouse, he was directed by his foreman to take orders from a man named Tony Terasky and to do as he did. Tony taught the plaintiff how to turn turntables, build fires in locomotives and watch the engines (Rec., 24). Tony also supervised the work of five or six men—enginemen and cinderpit men—when the night foreman was away (Rec., 77).

The night foreman was sick and not at work the night of the accident (Rec., 68). Tony was an old employee and was known as the "engine watcher" in the roundhouse at Waukegan. During the short time the plaintiff was employed by the defendant he worked under the direction of Terasky and properly regarded him as his superior.

By watching an engine is meant to see that the engine was supplied with plenty of coal and water. That was plaintiff's employment for the first few days.

On November 20th he started firing a stationary boiler and at times thereafter he fired a locomotive engine which was used in its stead. These instrumentalities, which were known as the heating plant, heated the roundhouse, passenger depot, baggage room, pipes in the coach yard for heating coaches, roundhouse foreman's office, engineers' and firemen's bunk car, bridge and building bunk car, carpenter's shop, the oil house and turntable in the roundhouse. The pipes in the coach yard were used to

supply heat for all coaches that needed heating in the winter time (Rec., 69).

Two or three coaches were customarily taken out of train 151 originating in Chicago, Illinois, and destined to Milwaukee, Wisconsin. These coaches remained in the yard and were heated in cold weather by this heating plant and again customarily moved back to Chicago in a train originating in Kenosha, Wisconsin (Rec., 71, 72). Passengers coming from without the state on through trains frequently disembarked at Waukegan, Illinois, and were then transported to intermediate stations at which the through trains did not stop, in suburban coaches which were heated by this plant (Rec., 72).

These coach yard pipes were connected with the turntable for the purpose of keeping it from freezing in the winter and to prevent the formation of ice on the rails. The turntable was used for turning all classes of engines used in intrastate and interstate commerce (Rec., 73).

On the day of the accident the stationary boiler was out of order and these various buildings and instrumentalities were being supplied with heat by a locomotive engine which was fired by the plaintiff between 4 p. m. and 9:15 p. m. on that date (Rec., 25).

Shortly after 9:15 P. M., the plaintiff told Terasky that the coal in the locomotive was very low and that coal was needed. About this time Mr. Gallop, the defendant's traveling engineer, who was recognized by all of defendant's employes as an officer superior to the men and foremen (Rec., 25), came into the roundhouse and in the presence of the plaintiff stated to Terasky that they were about to take four engines to Beach and asked Terasky if he would get a man to ride each one. Terasky said: "The fireman can ride one, the engineer can ride one, I will ride one, and I will get Bolle to ride the other one." Then

Terasky came back and said to plaintiff: "Gene, get up on your engine. We have to go to Beach to get coal and water," and thereupon plaintiff got upon his engine and it was backed out of the roundhouse and was coupled with the other three engines.

These engines were then operated from Waukegan to Beach, Illinois, a distance of four miles, through the open country, over the main line of the defendant (Rec., 25-26). The engines to which plaintiff's engine was coupled were all definitely assigned for use in interstate commerce at the time they started from Waukegan, for the purpose of being supplied with coal (Rec., 21, 22, 23); they were used in such service continuously for several days prior to and following the accident to the plaintiff (Rec., 23).

When the four engines were coupled together they were propelled northward by the most northerly engine which was headed or facing north. An engineer named Fleming was in charge of this engine. The plaintiff was on the second engine from the north and his engine was facing or headed south. The third engine from the north was facing north and Terasky and a member of the regular crew, named St. Martin, rode upon this engine. The fourth engine, or the most southerly engine, was facing south, and an engineer named Knoera was in charge of the latter engine.

While these engines were en route from Waukegan to Beach, plaintiff was required to fire his engine and "look after the water" (Rec., 26). Plaintiff had never performed a similar service and had never been to Beach prior to his injury. When the engines arrived at Beach, they were stopped alongside of a water tank on the main line of the defendant. Terasky, who had been riding on the engine next to plaintiff, directed him, according to plaintiff's testimony, to get on his engine and supply it with water.

(Teranky denied that he gave any such order [Rec., 89-90].) In obedience to this command, plaintiff got upon his engine, adjusted the spout and while the engine was being supplied with water and while plaintiff was standing upon the tender of said engine, the foreman in charge of the operation of these engines, McManaman, ordered him to disconnect the spout as the engines had to be switched from the main line to the side track to let a through train pass (Rec., 26-27). The order to disconnect or lay aside the spout was given the plaintiff when the tank was only partly filled with water and he so informed the foreman, McManaman. But the foreman peremptorily ordered him to "Throw it aside."

While this train of engines was standing on the side track, plaintiff got down into his cab temporarily and looked after the coal and water. The engines remained on the side track but a few minutes and were then operated back on the same track toward the water tank. Plaintiff, believing they would again stop at the water tank where he could complete the tank that he had begun, of taking water on his engine, again got upon the tender of his engine for this purpose. The engines did not stop at the tank but moved toward the north some distance and on to the east or south-bound main track. (There were but two main tracks at Beach. The north-bound trains being operated on the west track and the south-bound trains on the east track).

The engines were then moved toward the south on the east or south-bound track by the most southerly engine, and were brought to a stop opposite the coal chutes which were situated east of the east track. Plaintiff saw a man standing on the most southerly engine, which was the second engine to the south of him (Rec., 27). He did not, at that time, attempt to put coal in his engine because he

was waiting for Terasky, the man from whom he took orders and directions and who was on the engine next to him to the south, to put coal in his engine. It only took about two or three minutes to coal the most southerly engine and this train of engines was again moved southward, a short distance by the most southerly engine. When the engines came to a stop, following the second movement southward, the tender of plaintiff's engine, as well as Terasky's, were stopped directly opposite the coal chutes or slides.

When plaintiff saw the man on Terasky's engine, whom he believed to be Terasky, lower the coal chute of his engine, which was a simple task and accomplished by the mere jerk of a chain, and start coaling his (Terasky's) engine, plaintiff did likewise, jerked the chain, lowered the coal chute, and started to take coal on his engine (Bee., 26). While coal was being emptied into the tender of plaintiff's engine he was standing on the east side of the tender between the engine cab and the coal chute, watching the coal and in the plain view of Terasky or the man who was coaling Terasky's engine.

Plaintiff was also in the plain view of, and was seen by, defendant's foreman, McManaman (Bee., 55, 60). Plaintiff was also directly in the line of vision of the operating engineer on the second engine from the south as it stood facing northward, and there was no obstruction of any kind to prevent the engineer or any of defendant's employes, two of whom were standing close by in the west track (McManaman and St. Martin, a member of the switching crew) from seeing him (Bee., 54, 55, 100).

The process of emptying the coal into the tender made considerable noise (Bee., 28, 63). McManaman, who was called as a witness on behalf of the plaintiff on this trial, testified that he knew there was a man taking coal

on plaintiff's engine because he had the chute down; that he didn't, however, at that time, know it was Bolle; but did know he was an employee (Rec., 55); that he saw him there for perhaps one or two minutes before the accident; that he had time, after he discovered him there, to do something, but he didn't do anything because, as he stated, "I didn't think they would do anything while that man was there" (Rec., 56).

While the plaintiff was thus engaged, this train of engines was started and moved northward suddenly without notice or warning to plaintiff, and he was caught and crushed between the cab of the engine and the lowered coal chute.

The movement of this train of engines northward from the side track past the water tank and over on to the east or south-bound track, heretofore described, was made by the most northerly engine as it was headed northward. The two movements southward, as above stated, were made by the most southerly engine which was operated by engineer Kucera, and the movement northward that resulted in injury to the plaintiff, was also made by Kucera, but at that time the second engine from the south, the one immediately next to the plaintiff, and which was headed north, was used as the propelling engine.

Plaintiff's engine was a "live" engine and would have been used in propelling these four engines on the next movement to be made at the coal chutes, if plaintiff had not been injured (Rec., 103).

The orders and directions given by the traveling engineer to Terasky in Waukegan in the presence of the plaintiff and the repetition of the order to the plaintiff by Terasky, preceding the departure of this train of engines from Waukegan for the acknowledged purpose of supplying these engines with coal and water upon their arrival

at Beach (Rec., 29, 49), led plaintiff to believe that it was his duty to coal his own engine upon its arrival at Beach. The subsequent order given plaintiff by Teraaky at Beach to get upon the tender of his engine and supply it with water, confirmed his belief that it was the duty of the men in charge of these engines, to coal their respective engines (Rec., 29, 48). He knew nothing about the practice of having the coal chute man coal the engines and had received no instructions from anyone other than the directions given him by Teraaky (Rec., 26).

Summary of Argument.

Defendant asserts that the decision of the Appellate Court of Illinois "forced by the decision of the State Supreme Court" makes it the law of Illinois in all actions brought under the Federal Employers' Liability Act, even when the facts are not in dispute, that the question as to whether such facts bring the parties within the federal statute is for the ultimate determination of the jury.

The decision of the Supreme Court of Illinois is not, we submit, susceptible of any such interpretation. That Court did not hold or suggest that the question whether an injured employee is engaged in interstate commerce at the time of his injury should be submitted to a jury in any case where it appears from the evidence, as a matter of law, that the employment was not in interstate commerce. The Court simply held that where reasonable men could draw different conclusions as to whether defendant and the injured employee were engaged in interstate commerce or in intrastate commerce, it would be error for the Court to decide that issue, as all questions of fact should be submitted to the jury under proper instructions as to the law.

That the Supreme Court of Illinois, by its decision in

the case at bar, 324 Ill. 479, did not lay down a rule or doctrine in conflict with the applicable decisions of this Court or which would require the jury in all instances to determine the question whether the employment was in interstate commerce, is evidenced by its recent decision in the case of *Spencer* v. *C. & N. W. R. Co.* (this same defendant), 336 Ill. 560, reversing the decision of the trial and Appellate Courts, holding that the question whether Spencer was engaged in interstate commerce was properly submitted to the jury. Counsel in the case at bar represented the defendant in the *Spencer* case and they well know, in the light of that case, that the Illinois Supreme Court has not made it "the law of Illinois" and did not hold, in the instant case, or mean to be understood as holding, that where it appears, as a matter of law, from the undisputed evidence that the employment is not in interstate commerce, the question should be submitted to a jury for determination.

The Illinois Supreme Court held in the *Spencer* case that under the Federal Employers' Liability Act its jurisdiction is the same as the jurisdiction of this Court (citing cases of this Court on the subject), and that it was the duty of the Court to review the evidence and determine, as a matter of law, whether it was sufficient to sustain the judgments of the trial and Appellate Courts. The Illinois Supreme Court, following an extensive review of the facts in the *Spencer* case, held, as a matter of law, that the evidence was not such as to bring the plaintiff within the provisions of the federal statute. It is apparent, therefore, that there is no basis for the contention that the views expressed by the Supreme Court of Illinois in the case at bar are at all inconsistent with the decisions of this Court.

A petition for certiorari in the *Spencer* case was denied by this Court, 291 U. S. 736.

The question whether employment is in interstate commerce is an ultimate question of fact which, like negligence, assumed risk or other ultimate facts, must be determined from the evidentiary facts. Unless the conclusion follows as a matter of law that the employment is not in interstate commerce and that all reasonable minds must so conclude, the plaintiff is entitled to have his case submitted to the jury. In other words, if there is any uncertainty as to the character of the employment the question is not one of law but of fact.

Defendant's assertion (Petition, p. 27) that "as a matter of self-defense this court should review and reverse the judgment" is an unwarranted reflection upon the Supreme Court of Illinois.

Expressions used in certain cases relied on by defendant (Petition, p. 25) to the effect that where the facts are undisputed or are not in controversy, the character of the employment becomes one of law for the court must be understood as having application only to the particular facts appearing from the evidence in these cases. The decisions in these cases were based upon undisputed evidence showing conclusively that reasonable minds could not draw different conclusions on the subject of interstate commerce.

The record shows, without contradiction, that the three engines to which plaintiff's engine was coupled on the occasion in question were all definitely assigned for use in interstate commerce and that the trip from Waukegan to Beach, a distance of four miles through the open country over defendant's main line, was made for the purpose of supplying them with fuel for use in such commerce. We contend that the operation of the three engines to which plaintiff's engine was attached for the purpose mentioned establishes, as a matter of law, the interstate status of these engines and the men in charge of them. The unitary

character of the movement of the four engines and the direct participation therein by the plaintiff also establishes, as a matter of law, the plaintiff's employment in interstate commerce.

In any event plaintiff's general employment was clearly in interstate commerce and the trip to Beach for coal was but an incident thereof.

Obviously, in announcing the test so frequently quoted by defendant, as laid down in the *Shanks* case, 239 U. S. 556, this Court did not intend that it should be given the limited or narrow construction contended for by defendant.

The distinction between "commerce" and "transportation" which counsel are attempting to make in this case, has not been recognized by this Court as evidenced by its decisions subsequent to the *Shanks* case in which the terms are often used interchangeably.

It is manifest from the opinion of the Supreme Court of Illinois in the instant case that the plaintiff's employment at the time of his injury was well within the test announced by this Court in numerous decisions. The duties of the plaintiff are fully and clearly set forth in the opinion rendered by the Supreme Court of Illinois, 324 Ill. 479, and the statement of facts as set forth therein has been adopted by the Appellate Court, 258 Ill. App. 545 (Rec., 168).

Furthermore, it appears from the opinion of the Appellate Court which sets forth the facts found by the Supreme Court (Rec., 168, 169) that the defendant, in its brief filed in that Court in the instant case, did not contend that the facts were not as found by the Supreme Court of Illinois and as set forth in its opinion. The Appellate Court, in its opinion, states:

"It is not contended by counsel for appellant that the facts are not as above stated, but that, on the facts the finding that appellee was engaged in interstate commerce is not warranted by the evidence."

The principal cases relied on by defendant, namely: *Shanks*, 239 U. S. 556; *Harrington*, 241 U. S. 177; *Behrens*, 233 U. S. 473; *Cousins*, 241 U. S. 641; *Nash*, 242 U. S. 619, and *B. & O. v. Branson*, 242 U. S. 625, are easily and readily distinguished from the instant case, in that in none of these cases was the plaintiff engaged in the operation of an instrumentality of interstate commerce or in preparing it for use as such.

Negligence.

The defendant claims (Petition, p. 7) that the principal negligence alleged and attempted to be proved was the movement of the engines "without the ringing of a bell."

There is but one count, the second, which charges negligence in failing to ring the bell, and this count is based on the alleged violation of defendant's own rule. Other counts of the declaration alleged that the defendant ordered the plaintiff, a youthful and inexperienced employee, to engage in work with which he was totally unfamiliar, without instructing him as to his duties or as to the manner and method adopted by the defendant in supplying the engines in question with coal; that it failed to efficiently supervise the work that was being carried on at Beech; that plaintiff got upon his engine, adjusted the coal chute, and while coal was being emptied into the tender thereof, and while he was in an obviously dangerous position, in the event these engines should be started or moved (all of which facts the other experienced servants of the defendant knew, or in the exercise of ordinary care would have known), the said engines were started and moved without

notice or warning to the plaintiff, thereby causing the injury complained of.

The gist or gravamen of plaintiff's cause of action was the negligent starting of these engines while plaintiff was in a dangerous and exposed position coaling his engine.

Defendant asserts (Petition, p. 29):

> "It is uncontradicted that neither the coal chute man nor the man who started the engines at the time in question saw or could have seen the plaintiff."

While coaling his engine, the plaintiff was in the direct line of vision of the operating engineer (Rec., 100).

Plaintiff was also seen at work coaling his engine by the engineer in charge of the most northerly engine prior to and at the time of the starting of the engines (Rec., 112).

In our statement of the facts we have shown that McManaman, defendant's foreman, saw the plaintiff on his engine taking coal prior to and at the time the engines were set in motion (Rec., 60).

The engine watcher, Terasky, testified, on the second trial, that he saw a man on top of his engine prior to the movement in question but didn't know it was the plaintiff (Rec., 130).

Defendant contends (Petition, p. 7) that the failure to ring the bell on the engine before the train of engines was started or set in motion, could have no significance because plaintiff testified that he heard no bell

> " * * * before the starting of any other of the many movements, back and forth, and from chute to chute, prior to the movement in question, and that he had not paid, and was not paying, any attention to signals of any kind, by bell or otherwise."

It will be observed that there was but one movement of the engines southward after they were first spotted at the

coal chute—prior to the movement that injured the plaintiff (Rec., 28, 40).

While plaintiff testified that he heard no signal preceding this one movement southward, such movement was not made while the coal chute was down and while coal was being emptied into the tender of an engine, but was made only after the coaling operation was completed and the coal chute adjusted.

But one witness testified for the defendant that the engine bell was rung (Rec., 102). The manifest weight of the evidence is to the effect that the bell was not rung.

We submit that the plaintiff, at the time of his injury, in view of the instructions given him at Waukegan, was at a place where he had a perfect right to be, in the due course of his employment. Having been ordered up on his engine to take water and having been interrupted and ordered, while so doing, to throw the spout aside before this task was completed—i. e., before the tank on his engine was filled, it was reasonable for him to assume, in the absence of any instructions to the contrary, that when the engines started back toward the water tank, after having been placed on a side track to let a through train pass, that his engine would again be stopped at the water tank where the unfinished task of taking water could be resumed.

When the engines did not stop there, but instead took the cross-over and stopped at the coal chutes, it was only natural for the plaintiff, in the light of the general order given him at Waukegan and the subsequent order at Beach to put water in his engine, to assume and believe it to be his duty to adjust the coal chute and coal his engine.

Defendant had both actual and constructive notice that plaintiff was in a place of danger at the time these engines

were started, and defendant's negligence in the circumstances, is apparent.

Assumed Risk.

Plaintiff did not assume the risk of the negligent act or acts of defendant's employees suddenly and unexpectedly arising, and the doctrine of assumed risk is inapplicable to the facts in the present case.

Obviously, an employee does not assume the risk of the negligence of his employer or of his fellow employees unless he has knowledge of the negligence and the dangers arising therefrom or unless they are so plainly observable that he must be presumed in law to know of them. There is no evidence in the case which would support defendant's contention that the doctrine of assumed risk is at all applicable.

Instructions.

There was no error in giving or refusing instructions in this case. Defendant's instructions, as a series, embraced every possible theory of defense, viz., interstate commerce, scope of employment, actionable negligence on the part of defendant, and contributory negligence on the part of plaintiff.

The rules of law announced in many of these instructions were repeated over and over again and a number of them are more favorable to defendant than the law required.

All of defendant's refused instructions were fully covered by its given instructions or were misleading and argumentative and gave undue prominence to isolated items of the evidence. This type of instruction has been uniformly condemned by the courts.

Many of defendant's refused instructions attempt to split up the negligence charged in plaintiff's declaration and direct the jury on the evidence that singled out to render a verdict in its favor. Many of these instructions peremptorily directed a verdict for defendant and could not be given if the case were to be submitted to the jury for determination.

In other words, the defendant, by these instructions, attempted to do what this Court said, in the case of *Union Pacific Railroad Company v. Hadley*, 246 U. S. 355, it might not properly do if the Court was of the opinion that in leaving the general question to the jury "the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of negligence."

Alleged Improper Argument.

On page 6 of their petition, in discussing the propriety of submitting to the jury the question whether or not plaintiff was employed in interstate commerce, counsel state:

> "In the Appellate Court's opinion no mention is made of the line of authorities actually applicable although they were submitted to that Court in your petitioner's brief."

In view of the repeated reference by defendant's counsel to the alleged misstatements of plaintiff's counsel during the argument to the jury and of the reference by defendant's counsel in their petition to matters claimed to have been set forth in their brief in the Appellate Court of Illinois, we feel justified in referring to the plaintiff's briefs in both the Appellate and Supreme Courts of Illinois, wherein we directed the court's attention to the fact that, as appears from the complete record, p. 471, counsel for defendant also erred in his recollection of the testi-

many and vigorously asserted before the jury that plaintiff's counsel misstated the testimony of defendant's witness, Teraaky.

Immediately preceding the opening argument to the jury, plaintiff introduced in rebuttal, by way of impeachment, the testimony of Teraaky as given on the former trial of the case in February, 1933, to the effect that at the time plaintiff was injured Teraaky saw a man on top of plaintiff's engine, but did not know whether it was the plaintiff (Rec. 155).

Defendant's counsel was not only mistaken in his recollection as to the testimony of Teraaky on that trial as shown by the record, but he accused plaintiff's counsel of misstating the evidence. When it was demonstrated that he was in error, his explanation (Complete Record, 472) was: "twice the Court said you did not say it right—two times out of three—you were right once."

Furthermore, counsel for defendant argued to the jury that the ringing of the bell or the failure to ring it did "not cut any figure in the case." In other words, counsel stated "if the bell had been rung, what could he (the plaintiff) have done to save himself?" (Complete Record, 508).

There is nothing in the record to suggest that the verdict was obtained by appeals to passion or prejudice and we therefore submit that the errors assigned on the alleged improper argument of counsel for the plaintiff and the alleged excessiveness of the damages, having been settled adversely to defendant's contention by the decisions rendered by the Appellate and Supreme Courts of Illinois, do not present questions for re-examination in this Court.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The duties of plaintiff's general employment, viz., the heating of defendant's depot and the various instrumentalities of interstate commerce, including coaches used in its interstate trains and intrastate suburban coaches used in transporting interstate passengers (Rec., 71-72), were intimately and directly associated with the work of interstate commerce.

The trip to Beach for coal was incidental to plaintiff's general employment and was therefore also employment in interstate commerce.

Louisville & Nashville Ry. Co. v. Parker, 242 U. S. 13.

Southern Ry. v. Puckett, 244 U. S. 571.

Philadelphia B. & W. R. Co. v. Smith, 250 U. S. 101.

Erie R. Co. v. Collins, 253 U. S. 77.

Erie R. Co. v. Szary, 253 U. S. 86.

Hiser v. Davis, Director General of Railroads, 234 N. Y. 300.

Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353.

Davis v. Dowling, 284 Fed. 670.

N. Y. Cent. Ry. Co. v. Winfield, 244 U. S. 147.

Oliver v. Northern P. R. Co., 196 Fed. 432.

N. Y. Central R. R. Co. v. Carr, 238 U. S. 262.

Breske v. Minneapolis & St. L. Ry. Co., 115 Minn. 386 (132 N. W. 337).

Philadelphia B. & W. R. Co. v. McConnell, 228 Fed. 263-265.

Boyle v. Pa. R. R. Co., 228 Fed. 266.
Guido v. Penn. R. R. Co., 185 App. Div. (N. Y.) 880; affirmed 224 N. Y. 712.

11.

The operation of the train of engines from Waukegan to Beach was a necessary preparatory movement in aid and furtherance of interstate commerce.

(a) The movement of the three engines to which plaintiff's engine was attached from Waukegan to Beach for the purpose of supplying them with coal for use in interstate commerce, establishes as a matter of law the interstate status of these engines and the men in charge of them.

(b) The unitary character of the movement of the four engines and the direct participation therein by the plaintiff, places him also as a matter of law within the same classification.

(c) The presence of the plaintiff or some other person on his engine was necessary to the movement of these engines from Waukegan to Beach and return, and the duties which plaintiff performed thereon were essential to the proper movement of said train of engines and to the safety of defendant's other employees and its property.

(d) He had certain, definite duties to perform, viz.: to keep the fire going in his engine and to see that the proper amount of water was maintained in the boiler.

(e) His work was essentially the same as that performed by the train employees in charge of these engines and subjected him to all the risks and hazards incidental to such service while the train of engines was being operated between Waukegan and Beach over defendant's main line.

(f) Plaintiff's engine was "a live" engine and would

have been used in propelling these four engines on the next movement to be made at the coal chutes if plaintiff had not been injured (Res., 103).

VII.

Under the undisputed evidence in this case, the work respondent was engaged in at the time of his injury brought him within the purview of the Federal Employers' Liability Act as a matter of law.

The facts fully satisfy the test laid down in the *Shanks* case (239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436).

In any event if reasonable minds could draw different inferences from the facts and circumstances in evidence as to whether respondent was so engaged, the question was properly submitted to the jury.

Southern Ry. Co. v. Lloyd, 230 U. S. 426.
N. Car. R. Co. v. Zachary, 232 U. S. 248.
Balt. & O. Ry. Co. v. Whitacre, 124 Md. 611.
N. Y. C. R. Co. v. Carr, 238 U. S. 260.
Balt. & O. R. Co. v. Kast (Cir. Court of Appeals, 6th Dist. June 6, 1924), 299 Fed. 419.
Mappin, Admx. v. A. T. & S. F. Ry. Co., 196 Cal. 739; 247 Pac. 911.
Erie R. R. Co. v. Van Bushirk (C. C. A. 3rd), 1 Fed. 24, 70.
Dickinson v. Industrial Board, 280 Ill. 242, 244.
Erie R. R. Co. v. Welsh, 242 U. S. 303.
Roberts on Federal Liability of Carriers, Vol. 1, Secs. 481, 486, 487.
Boyle v. Pa. R. R. Co., 225 Fed. 266 (Circuit Court of Appeals, Third Circuit).
Brown v. Ill. Terminal Co., 312 Ill. 326, 334.
Davis v. Chicago R. I. & P. Ry. Co., 134 Minn. 49; 156 N. W. 911.

Penn. Co. v. *Donat*, 239 U. S. 50, 52.
Brock v. *Chicago, R. I. & P. R. Co.*, 305 Mo. 520 (Certiorari denied 268 U. S. 684).

In *Industrial Commission* v. *Davis*, 259 U. S. 182, wherein certiorari to the District Court of Appeals of the State of California was allowed, in holding that a precise ruling as to when a railroad employee is engaged in interstate or intrastate commerce, had not been attempted to be laid down and that it was not tangible to the perception of the Court how this could be done, this Court said, p. 188:

> "Further discussion is unnecessary though we are besought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now. Besides, things do not have to be in broad contrast to have different practical and legal consequences. Actions take estimation from degrees and of this, life and law are replete with examples."

In the case of *Southern Railway Co.* v. *Lloyd*, 166 N. C. 27; 81 S. E. 1004, although there was no dispute as to the facts bearing upon the character of the plaintiff's employment, the trial court submitted to the jury the question whether or not the plaintiff was employed in interstate commerce. It was contended in this court, 239 U. S. 496, that the trial court should have given the instruction requested by the defendant to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce. In affirming the judgment of the trial court, this court said, at page 501:

> "In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect. *North Carolina R. R.* v. *Zachary*, *supra*; *Pederson* v. *Del. Lack. & Western R. R.*, 229 U. S. 146; *New York Central R. R.* v. *Carr*, 238 U. S. 260; *Pennsylvania Co.* v. *Donat*, decided by this Court November 1, 1915, ante, p. 50."

Whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce in the case at bar, turned upon no interpretation of the act of congress but involved simply "an appreciation of the testimony" and the legitimate inferences deducible therefrom.

Erie Railroad Co. v. Welsh, 242 U. S. 303.

In the absence of clear and palpable error, this Court will not disturb the concurrent findings of state, trial and Appellate Courts in cases arising under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169.

Patton v. Texas & Pac. Ry. Co., 179 U. S. 658.
Supreme Lodge K. of P. v. Beck, 181 U. S. 48, 50.
Erie Railroad Co. v. Welsh, 242 U. S. 303.

IV.

This Court has not recognized the distinction between "commerce" and "transportation" that the defendant is seeking to make in this case.

In the case of *Erie R. R. Co. v. Collins*, 253 U. S. 77, this Court, in passing upon the character of the plaintiff's employment in that case, said, page 85:

> "In the *Pederson* case it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?' *Or as said in Shanks v. Delaware, Lackawanna & Western R. R. Co., supra, was the 'work so closely related to it (interstate commerce) as to be practically a part of it?' The answer must be in the affirmative.*"

Obviously, in announcing the test so frequently quoted by the defendant, as laid down in the *Shanks* case (*supra*), 239

U. S. 656, this Court did not intend that it should be given the limited or narrow construction contended by the defendant, otherwise this Court would not have expressed the views or reached the conclusions that it did in the cases of *Erie R. Co. v. Collins*, 253 U. S. 77; *Erie R. Co. v. Scary*, 253 U. S. 86, and *Philadelphia B. & W. R. Co. v. Smith*, 250 U. S. 101, or in the great majority of cases where the employment was held to have been in interstate commerce.

V.

Defendant was guilty of negligence, as interpreted and applied both by the Federal courts and the courts of Illinois.

Defendant's conduct in directing plaintiff—a green, inexperienced employee—to get on his engine and go to Beach for coal and water, without further instructions relative to his duties or as to the manner or method used by defendant in coaling its engines, and in permitting these engines to start forward, after defendant's foreman had observed plaintiff on top of his engine taking coal, in time to have prevented such movement, was clearly negligent and the direct proximate cause of plaintiff's injury.

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 192.
Illinois Central R. R. Co. v. Skaggs, 240 U. S. 66, 69.
Devine v. Delano, 272 Ill. 166, 179-180.
N. Y. Cent. R. Co. v. Gapinski, 249 Fed. 346.
Ill. Cent. R. R. v. Siler, 229 Ill. 390, 393.
Hurst, Admr. v. Madison Coal Corp., 201 Ill. App. 205, 207.
Ford v. Hine Bros. Co., 237 Ill. 463, 467-468.
Union Pacific R. R. Co. v. Hadley, 246 U. S. 330, 332, 333.

It was the primary duty of the defendant to instruct the plaintiff as to the line of his duty and to warn him of the dangers and hazards connected therewith.

18 Ruling Case Law, p. 567.

Pressed Brick Co. v. Reinmeiger, 140 Ill. 334, 338.

White v. Nutriline Milling Co., 133 La. 870; 63 So. 355.

Eldridge v. Citizen's Ry. Co., 169 S. W. 875.

Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and this is true whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.

Richmond & Danville Rd. v. Powers, 149 U. S. 43, 45.

Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593, 606.

VI.

Plaintiff did not assume the risk of the negligent act or acts of defendant's employees suddenly and unexpectedly arising, and the doctrine of assumed risk is inapplicable to the facts in the present case.

Gila Valley, etc. Ry. v. Hall, 232 U. S. 94.

Seaboard Air Line v. Horton, 233 U. S. 492.

Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 12.

Yazoo & Miss. R. R. v. Wright, 235 U. S. 376.

Erie R. R. Co. v. Purucker, 244 U. S. 320.

Grannon v. Donk Bros. Coal Co., 259 Ill. 350, 355.

Illinois Steel Co. v. Schymanowski, 162 Ill. 447.

Slack v. Harris, 200 Ill. 96.

Whether the danger was so obvious that an ordinarily prudent person in respondent's situation would have observed and appreciated it, was a question for the jury.

C. & O. v. DeAtley, 241 U. S. 310-315.

C. & O. v. Proffitt, 241 U. S. 462-468, and cases cited.

The settled rule is that it is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer, or of those for whose conduct the employer is responsible.

Chesapeake & Ohio Ry. Co. v. DeAtley, 241 U. S. 310, 315.

Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1; 51 L. Ed. 681.

Great Northern R. Co. v. Knapp, 240 U. S. 464; 60 L. Ed. 745.

Under the Federal Employers' Liability Act, the burden of proving that the plaintiff assumed the risk of injury or was guilty of contributory negligence is upon the defendant.

Seaboard Air Line Railway v. Moore, 228 U. S. 433.

Central Vermont Ry. Co. v. White, 238 U. S. 507.

Roberts on "Federal Liability of Carriers," Vol. 1, Secs. 426, 427.

Fisher v. C. R. I. & P. Ry. Co., 290 Ill. 49, 56.

Waiswila v. Illinois Central R. Co., 220 Ill. App. 113.

VII.

The trial court did not err in the giving or refusal of instructions.

Pedersen v. *Del. Lack. & West. R. R.*, 229 U. S. 146.
Erie R. R. Co. v. *Collins*, 253 U. S. 77.
Erie R. R. Co. v. *Seary*, 253 U. S. 86.
Philadelphia, B. & W. R. R. Co. v. *Smith*, 250 U. S. 101.
Devine v. *C. R. I. & P. Ry. Co.*, 266 Ill. 248, 254.
Kenna v. *C. H. & S. E. R. R. Co.*, 284 Ill. 301.

(a) Defendant's refused instructions are either covered by its given instructions or are argumentative and erroneously single out items of evidence favorable to it, without reference to other facts and circumstances favorable to the plaintiff.

(b) An instruction which singles out evidence favorable to one party and ignores the evidence most favorable to the other, is vicious, especially where it fails to state that the evidence singled out may be considered in connection with all of the other facts and circumstances in evidence, or to indicate that there is any countervailing evidence on the subject.

Jeger v. *Julius Kessler & Co.*, 218 Ill. App. 39.
Evans v. *George*, 80 Ill. 51.
Tanner v. *Clapp*, 139 Ill. App. 353.
Norton v. *Clark*, 253 Ill. 557, 569.
Craig v. *Miller*, 133 Ill. 300, 305.
Sullivan v. *Eddy*, 164 Ill. 391.

If the instructions taken as a whole present the law with substantial correctness, it is sufficient.

Day v. *Porter*, 161 Ill. 235.
W. & S. Co. v. *O'Rourke*, 172 Ill. 177.

T. M. & N. R. Co. v. *Haws*, 194 Ill. 92.
Cent. Ry. Co. v. *Bannister*, 195 Ill. 50.
C. C. Ry. Co. v. *Mead*, 206 Ill. 178.
City of Roodhouse v. *Christian*, 158 Ill. 137.

VIII.

Where two juries have returned similar verdicts and the trial judge has each time approved those verdicts, it is a rule of long standing that courts of review will be extremely reluctant to interfere with such verdicts.

Stanton v. *Chicago City Ry. Co.*, 205 Ill. App. 385.
Merrill v. *Merrill*, 215 Ill. App. 602.
Upthegrove v. *Chicago Great Western R. R. Co.*, 168 Ill. App. 89.
Bates v. *Danville Street R. & L. Co.*, 190 Ill. App. 486.
Larson v. *Ward Corby Co.*, 198 Ill. App. 109.
Gill v. *Gill*, 197 Ill. App. 211, 213.
O'Brien v. *Curran*, 189 Ill. App. 542.
Volger v. *Chicago & C. Co.*, 196 Ill. App. 574, 581.
Walker v. *Dailey*, 112 Ill. App. 524, 527.
Martin v. *Duncan*, 79 Ill. App. 527, 528.
Joliet Ry. Co. v. *Ferguson*, 93 Ill. App. 467, 468.
Wood v. *Hildreth*, 73 Ill. 525, 526.
Nevins v. *Gourley*, 97 Ill. 365, 370.

IX.

The alleged procedural errors are not subject to review in this court.

In *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, the rule is announced that this court considers only assignments relating to matter of practice, pleading and evidence

which involves a construction of the Federal statute. It is said, p. 509:

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and the various rulings of the trial court which involve no construction of the Employers' Liability Act which, therefore, cannot be considered on writ of error from a State Court. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 486."

This Court will not review non-Federal questions which do not in their essence involve the existence of the right to recover under the Federal statute.

Seaboard Air Line v. *Padgett*, 236 U. S. 668.

X.

The question of excessive damages is a matter to be dealt with by the State Courts, and does not present a question for re-examination in this court.

Southern Ry. v. *Bennett*, 233 U. S. 80-87.
Lincoln v. *Power*, 151 U. S. 436.
Herencia v. *Gusman*, 219 U. S. 44-45.
Louisiana Oil Refining Corporation v. *Reed et al.*, 38 Fed. (2d) 159-162.
Chicago, & E. I. Ry. Co. v. *Divine*, 39 Fed. (2d) 537-539.
St. Louis Ry. Co. v. *Craft*, 237 U. S. 648.

Respondent respectfully submits that the petition for certiorari should be denied.

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